BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments,	)	MB Docket No. 05-162
FM Broadcast Stations	)	RM-11227
(Enfield, New Hampshire; Hartford and White River	)	RM-11295
Junction, Vermont; and Keeseville and Morrisonville,	)	
New York)	)	

To: Office of the Secretary
Attn: The Commission

REPLY

Radio Broadcasting Services, Inc. ("RBS"), by its attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby replies to the Opposition submitted by Nassau Broadcasting III, L.L.C. ("Nassau"), the licensee of Station WWOD(FM), Channel 282C3, Hartford, Vermont and WXLF(FM), Channel 237A, White River Junction, Vermont ("WXLF"), to the Application for Review ("Application") filed by Hall Communications, Inc. ("Hall"). In the Application, Hall seeks review of the decision of the Media Bureau ("Bureau") in *Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, DA 06-1007 (rel. May 12, 2006) ("*Keeseville II Order*"), granting the Petition for Rule Making filed by Nassau. The Opposition's arguments are unavailing. Hall's Application should be granted and the *Keeseville II Order* overturned. In support thereof, RBS states as follows.

In its Opposition, Nassau only half-heartedly defends the Bureau's reasoning in the *Keeseville II Order*, devoting the greater part of its Opposition to its argument that even if the

Bureau got it wrong on the law, nothing in the Application calls into question the outcome of the *Keeseville II Order*, save with respect to the reallotment of Channel 231A from Keeseville, New York to Morrisonville, New York. Nassau contends that any legal error at the heart of *Keeseville II* can be overcome by simply retaining Channel 231A at Keeseville as well as allotting Channel 282C3 to Keeseville. While such a move would permit Nassau to claim the prize it has long sought – the Channel 282C3 allotment at Keeseville – it does not adequately redress the faulty legal analysis relied upon by the Bureau in the *Keeseville II Order* and it eviscerates the public interest benefits allegedly justifying the Bureau's decision in *Keeseville II* to turn the earlier *Keeseville I* proceeding[1] on its head.

The petitioners in *Keeseville I* sought to change the allotments of WWOD, Channel 282C3 from Hartford, Vermont to Keeseville, New York and WXLF, Channel 237A from White River Junction, Vermont to Hartford, Vermont.[2] The Commission rejected the proposal, correctly choosing instead to accept Hall's Counterproposal for a new drop-in channel at Keeseville, thereby bringing a first local service to Keeseville without disrupting existing service at either Hartford or White River Junction, Vermont. In rejecting the petitioners' initial proposal (as well as their settlement proposal, involving a second allotment at Keeseville, offered in response to the Counterproposal) the Commission reasoned as follows:

> We conclude that adopting the new drop-in channel to Keeseville at the same time maintaining the balance of existing services would best serve the public interest. In addition to a first local service to Keeseville (population 1,850 persons), adoption of the counterproposal would maintain a first local service on a higher class channel at Hartford (population 10,367 persons) and maintain the first competitive and first nighttime service at White River Junction. The public

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[1] *See Keeseville, New York, Hartford and White River Junction, Vermont*, 19 FCC Rcd 16106 (MB 2004) ("*Keeseville I*").

[2] *See id.* at 16106.

> interest is better served by maintaining the second local and first nighttime service at the larger community of White River Junction (population 2,569 persons) than allotting a second channel to the smaller community of Keeseville. Further, this *is consistent with our analysis of similar cases decided under Priority (4) in which* we have held that retention of the original community's first competitive and first nighttime service outweighs the new community's need for a first competitive or second local service. Hall [Hall Communications, the party offering the Counterproposal] has indicated that it would apply for this channel if we allotted it.[3]

As RBS has previously pointed out,[4] this paragraph set forth two clear facts that Nassau ignored with its *Keeseville II* proposal: (1) *Keeseville I* represented a well-reasoned, deliberate decision on the part of the Commission to allot Channel 231A to Keeseville and to preserve the "balance of existing services" at Hartford and White River Junction; and (2) Hall's expression of interest in the Channel 231A Keeseville allotment is a matter of Commission record.

Rather than bother with reconsideration proceedings, as it should have done, Nassau simply started the rulemaking process anew. In *Keeseville II*, Nassau proposed the very same reallotments of Channel 282C3 from Hartford, Vermont to Keeseville, New York and Channel 237A from White River Junction, Vermont to Hartford, Vermont that the Bureau rejected in *Keeseville I*. This time around, Nassau threw in a couple of extras to justify its position: (1) the reallotment of vacant Channel 231A from Keeseville, New York to Morrisonville, New York; and (2) the allotment of Channel 282A to Enfield, New Hampshire. Nassau's selling point in *Keeseville II*: the Morrisonville and Enfield allotments represent first aural local services. To reap these benefits, the Bureau need only abandon the public interest considerations

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[3] *Id.* at 16110.

[4] *See* RBS's Comments, filed May 31, 2005, in MM Docket No. 05-162, *Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, 20 FCC Rcd 7587 (MB 2005) ("*Keeseville II NPRM*").

underpinning *Keeseville I* as well as its result – Hall's expression of interest in Channel 231A at Keeseville.

As evidenced by the *Keeseville II Order*, the sales pitch worked. Of course, as pointed out by Hall in its Application and by RBS in its Comments in Support of the Application, the Bureau's about-face in accepting the *Keeseville II* proposal has no basis in fact or law. In granting Nassau's proposal, the Bureau abandoned the Commission's well-settled policy against deleting an allotment in which a party has expressed an interest,[5] offering no basis – other than a factually inaccurate reading of Commission precedent – for the departure.

In casually dispensing with longstanding Commission policy, the Bureau attempted to distinguish cases cited by Hall from the instant proceeding on grounds that the cases cited by Hall involved not merely the deletion of an allotment in which a party had expressed interest, but situations in which a community would have been deprived of any first local service.[6] However, contrary to the Bureau's assertions, a number of cases cited by Hall did not involve first local

[5] As the Commission has consistently held: "It is Commission policy not to delete a channel in which an interest has been expressed." *Martin, Tiptonville and Trenton, Tennessee*, 15 FCC Rcd 12747 (MB 2000). *See also Montrose and Scranton, Pennsylvania*, 5 FCC Rcd 6305 (1995). The Bureau continues to apply this policy on a regular basis. *See, e.g., Culebra and Vieques, Puerto Rico*, Report and Order, DA 06-1308 (rel. June 23, 2006). The Bureau also regularly applies a corollary of this policy in connection with competitive bidding for new allotments, namely that "neither the Commission's rules nor [its] auction procedures permit allotment proponents to modify station licenses to specify vacant allotments which will be auctioned at a later date." *Letter, dated May 19, 2006, from John A. Karousos, Assistant Chief, Audio Division, to A. Wray Fitch, III, Esq.* As noted by Hall, vacant Channel 231A was subject to auction procedures, and while WWOD had not proposed utilizing Channel 231A in Keeseville, its proposal had the same practical effect – deleting a vacant channel that would have been available for auction. *See* Application for Review at 4, n. 3 and Attachment A.

[6] *See Keeseville II Order* at ¶ 4.

service issues at all, but rather focused on the rights of those parties who had expressed an interest in the subject communities.[7]

As RBS argued in its Comments, the Bureau's attempt to distinguish the instant proceeding from prior cases on the basis of community/service issues represents an obvious effort to shift focus away from the rights of parties. That effort fails. The Commission has plainly stated that its policy against deleting vacant allotments in which parties have expressed an interest is meant to provide fairness and certainty to the parties themselves:

> The policy reflects the Commission's view that one critical aspect of implementing the mandate of Section 307(b) of the Communications Act is to provide an efficient allotment system that affords prospective applicants reasonable certainty and administrative finality in seeking to initiate service. In short, the 'fair distribution' of service analysis which underlay the original allotment decision should not be disturbed where an active interest in providing service exists.

Montrose, 5 FCC Rcd at 6306. The Bureau's decision in the *Keeseville II Order* therefore marks a sharp break with Commission policy and precedent, a break the Bureau's flawed analysis of caselaw hardly justifies. An agency must "provide an adequate explanation before it treats similarly situated parties differently." *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1987) (citing *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)); *see also Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965). Moreover, if an agency "changes its course by rescinding a rule or departing from precedent [it] is obligated to supply a reasoned analysis for such a change." *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983). The Bureau's unsupported departure from Commission precedent in *Keeseville II* obviously fails these standards.

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[7] *See* Hall's Application at 6-7 (citing *Montrose, supra* and *Martin, supra*).

Recognizing the Bureau's flawed reasoning, in its Opposition Nassau offers scant justification for the Bureau's analysis in the *Keeseville II Order*. Instead, Nassau posits its own modest distinction, by way of footnote, in attempt to reconcile *Keeseville II* with the long line of cases holding that an allotment in which a party has expressed an interest may not be deleted absent extraordinary circumstances. According to Nassau, while Commission policy prohibits the deletion of a vacant allotment in which a party has expressed interest, there is no equivalent policy prohibiting the reallotment of a vacant FM channel in which a party has expressed interest.[8] However, the distinction Nassau attempts to draw is flatly contradicted by Commission precedent. In *Montrose*, the Commission rejected the *reallotment* of a channel from Scranton to Montrose, Pennsylvania because a party had expressed an interest in the Scranton channel.[9]

Rather than pursue an unprofitable defense of the *Keeseville II Order*, Nassau instead attempts to secure its winnings in *Keeseville II* – the Channel 282C3 allotment at Keeseville – by jettisoning the sticking point in its proposal, namely the reallotment of Channel 231A from Keeseville to Morrisonville. According to Nassau, if the Bureau retains Channel 231A at Keeseville while the remainder of the *Keeseville II Order* stands, everyone wins. However, this ignores the fact that Hall directed its request for relief to the Commission's entire rulemaking and not to any particular element of it. Moreover, Nassau has not evidenced, nor is there precedent for, a proponent or opponent of a rulemaking being, *sua sponte*, to bifurcate a Commission rulemaking proceeding. On the contrary, a rulemaking stands or fails on its own merits and the merits of the entire decision are what the Commission must now decide upon.

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[8] *See* Opposition at 7, n. 11.
[9] *See Montrose, supra.*

Moreover, Nassau's newfound position conveniently ignores the interrelated nature of the changes sought in Nassau's original proposal – how, according to Nassau itself, the benefits associated with certain changes allegedly compensate for the costs associated with others. Nassau sold the Channel 283C3 allotment to Keeseville, at least in part, on the basis of the Channel 231A allotment to Morrisonville.[10] And the Bureau accepted Nassau's proposal on the same basis.[11] Abandoning the reallotment of Channel 231A to Morrisonville obviously alters the public interest calculus and necessitates the reevaluation of the entire proposal, including reconsideration of the Bureau's conclusions in *Keeseville I*. The Bureau's holding in the first Keeseville proceeding – that two allotments at White River Junction are preferable to two allotments at Keeseville – should not have been displaced by Nassau's Enfield and Morrisonville proposals, so surely it should not be displaced if one of those proposals is removed from the table. At the very least, this is an issue requiring a full-fledged and well-reasoned decision making effort on the part of the Bureau, not the simplistic, self-serving solution proposed by Nassau in its Opposition.

In sum, the *Keeseville II Order* is based on flawed legal and factual analyses, and Nassau's Opposition does not remedy its failings. The Bureau erred by departing from the Commission's prohibition on deleting or realloting a vacant allotment in which a party has expressed an interest. Nassau's attempt to preserve the outcome of *Keeseville II* while admitting the erroneous basis of the *Keeseville II Order* is unavailing. Such a move fails to redress the faulty legal analysis relied upon by the Bureau in *Keeseville II* while undercutting the public

[10] *See* Nassau Comments and Statement of Intention, filed May 31, 2005, in MM Docket No. 05-162; Nassau Reply Comments, filed June 14, 2005, in MM Docket No. 05-162.

[11] *See Keeseville II Order* at ¶ 5.

interest benefits allegedly justifying the Bureau's decision. Accordingly, the *Keeseville II Order* must be reversed.

WHEREFORE, Radio Broadcasting Services, Inc. respectfully requests that the Commission reverse the Media Bureau's decision granting the Petition for Rule Making submitted by Nassau Broadcasting III, L.L.C., and restore the Channel 231A allotment to Keeseville, New York.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sharon McDonald, do hereby certify that I have, on this 27th day of July, 2006, served a copy of the foregoing "Reply" on the following parties, by first-class mail, postage prepaid:

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